

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

**WILLIAM C. SHAW, also known as
WILLIAM CALLOWAY SHAW,**

Appellant.

No. 27610-4-III

) (consolidated with

) No. 28214-7-III)

) Division Three

) UNPUBLISHED OPINION

**In the Matter of the Application
for Relief From Personal Restraint
of:**

WILLIAM C. SHAW,

Petitioner.

Kulik, C.J. — William Shaw pleaded guilty to one count of third degree assault and two counts of communicating with a minor for immoral purposes. The court entered one judgment and sentence for the felony and one judgment and sentence for the two misdemeanors. The court sentenced Mr. Shaw to 365 days for each of the misdemeanor

convictions, totaling 730 days. Mr. Shaw was given credit for time served, and the court suspended the remainder of his sentence, 484 days, for a period of four years. Mr. Shaw was placed on probation for a period of four years. Mr. Shaw violated the terms of his probation, and the court entered an order to modify his probation. Mr. Shaw appeals this order, asserting the trial court erred by tolling his suspension. Mr. Shaw also asserts the trial court exceeded its authority by imposing a four-year suspended sentence probationary period.

We conclude that Mr. Shaw's suspended sentence and his probationary period exceed the statutory limit. Therefore, we void the sentence and remand for resentencing.

FACTS

In June 2007, William Shaw was charged with one count of attempted first degree child molestation, one count of indecent exposure, and two counts of communication with a minor for immoral purposes. In exchange for Mr. Shaw's guilty plea, the State amended the charges to one count of third degree assault and two counts of communicating with a minor for immoral purposes.

The trial court entered two separate judgment and sentences—one for the felony and one for the two misdemeanors. The court sentenced Mr. Shaw to three months in jail for the third degree assault charge. For the two misdemeanor counts, the court sentenced

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Mr. Shaw to 365 days for each count, to be served consecutively, totaling 730 days.

Mr. Shaw was given 246 days of credit for time served. The court suspended the remaining 484 days of the 730-day sentence under RCW 9.95.210. The court ordered suspension for a period of four years. The court also placed Mr. Shaw on probation for four years under the supervision of the Department of Corrections.

On April 18, 2008, the court ordered modification of Mr. Shaw's probation as the result of a probation violation. The court ordered Mr. Shaw to serve 120 days in jail.

On October 28, 2008, the trial court again modified Mr. Shaw's probation as the result of another probation violation. The court ordered Mr. Shaw to serve 196 days in jail. On this order, the court wrote: "supervision tolled during periods of incarceration." Clerk's Papers (CP) at 66.

Mr. Shaw appeals his original sentence and the October 28 order, asserting the trial court exceeded its authority by ordering suspension and probation for four years. Mr. Shaw also asserts the trial court erred by ordering his suspended sentence tolled while he was incarcerated.

ANALYSIS

Four-year Suspended Sentence Probationary Period. A trial court must follow the statutory provisions in suspending a sentence or granting probation. If the trial court does

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not follow these provisions, its action is void. *State ex rel. Schock v. Barnett*, 42 Wn.2d 929, 931-32, 259 P.2d 404 (1953).

Mr. Shaw asserts that the trial court erred by imposing a suspended sentence probationary period of four years. He contends that the trial court was limited to suspending his sentence for 484 days and imposing probation for up to two years, minus the amount of time he already served; that is, imposing probation for 484 days. The State asserts that the two-year limit applies to the amount of time the court suspends—here, 484 days. Regarding probation, the State contends that there is no limit on the amount of time a trial court can impose, citing the language in RCW 9.95.210(1) that a trial court can direct suspension to “continue upon such conditions and for such time as it shall designate.”

The trial court has broad discretion to impose a suspended sentence on a misdemeanor conviction. Generally, a sentence is either deferred under RCW 9.95.210, meaning the trial court suspends the imposition of the sentence, or the sentence is suspended under RCW 9.92.060(1), meaning the trial court suspends the execution of a sentence which has already been imposed. *See State v. Parsley*, 73 Wn. App. 666, 668 n.1, 870 P.2d 1030 (1994). However, the trial court can also suspend the execution of a sentence which has already been imposed under RCW 9.95.210.

Each statute limits a defendant's suspended sentence in slightly different ways so the trial court's decision of which statute to use determines which terms apply to a defendant's suspended sentence. *See* RCW 9.95.210(1); RCW 9.92.060. Here, the trial court imposed Mr. Shaw's suspended sentence under RCW 9.95.210, as was noted in his judgment and sentence.

RCW 9.95.210(1) states:

In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.

The statute's plain language states that the trial court can suspend Mr. Shaw's sentence up to his maximum term of sentence, which is 730 days, or two years, whichever is longer. Because Mr. Shaw's maximum term of sentence is equal to the statutory two-year maximum, it appears that Mr. Shaw's maximum term of suspension is two years.

The State contends that the trial court can order any term of probation it wishes based on the language that the court may direct suspension "for such time as it shall designate." RCW 9.95.210(1). However, the next part of the quoted sentence reads "not exceeding the maximum term of sentence or two years," thus limiting the trial court's imposition of probation.

Mr. Shaw asserts that the trial court exceeded its authority by imposing probation for four years because it only had the authority to impose probation for the maximum term (two years), minus the time Mr. Shaw already served (246 days), or 484 days. Again, RCW 9.95.210(1) states that the court can suspend the execution of a sentence for the maximum term of sentence or two years. The trial court could have suspended Mr. Shaw's sentence and imposed probation up to the statutory maximum of two years. Here, the trial court exceeded its authority by suspending Mr. Shaw's sentence for four years when the limit in the statute is two years.

In summary, Mr. Shaw's suspended sentence and his probationary period exceed the limits set forth in RCW 9.95.210(1). We, thus, void the sentence and remand for resentencing within the statutory limitations.

Tolling While Incarcerated. Mr. Shaw asserts that the trial court erred by tolling his suspended sentence while he was incarcerated. To support his position, he directs the court to a handwritten note on the October 28 order modifying probation which he states says "suspension tolled during periods of incarceration." Appellant's Br. at 3. The handwritten note actually reads, "supervision tolled during periods of incarceration." CP at 66.

The court appears to explain the meaning behind this handwritten note when it

gives its ruling on the record. Following the October 24 proceeding, Mr. Shaw's probation supervisor changed. The court suggested that the new supervisor become acquainted with Mr. Shaw while he was in jail in order to facilitate a smoother transition back into the community. It appears that the court determined that supervision while Mr. Shaw was incarcerated could not be done. Therefore, the court wrote that supervision was tolled while Mr. Shaw was incarcerated.

State v. Robinson, 142 Wn. App. 649, 653, 175 P.3d 1136 (2008) states that a defendant's suspended sentence probationary period is tolled when the defendant "is not subject to the court's control and probation supervision." The court continues, "[t]his includes the time a defendant is on appeal, on warrant status, in prison, or outside the jurisdiction in violation of probation terms." *Id.* *Robinson* makes it clear that a trial court can toll a defendant's suspended sentence probationary period when the defendant, as here, is in jail. Mr. Shaw's argument lacks merit.

STATEMENT OF ADDITIONAL GROUNDS

Mr. Shaw asserts, in his statement of additional grounds, that the issues in this case are moot because he is no longer incarcerated. While Mr. Shaw may no longer be incarcerated, he does have a suspended sentence and is on probation. Both of the issues raised by Mr. Shaw's attorney are challenges to his suspended sentence and probation.

Therefore, the issues raised on appeal are not moot.

PERSONAL RESTRAINT PETITION

Mr. Shaw's personal restraint petition raises issues with his original guilty plea as well as the probation violation that is the subject of the October 28, 2008 order to modify probation.

The notice of violation stated that Mr. Shaw had violated his probation by (1) having contact with minors, (2) traveling to Idaho without permission, and (3) failing to report to the Department of Corrections. Following a hearing, the superior court found that Mr. Shaw violated his probation only by traveling to Idaho without permission and sentenced him to 196 days in jail.

Mr. Shaw originally brought this personal restraint petition in the Supreme Court. The Supreme Court transferred Mr. Shaw's personal restraint petition to this court where it was consolidated with Mr. Shaw's appeal. Some of Mr. Shaw's assertions in this personal restraint petition have already been addressed by this court in a previously-decided personal restraint petition.

Ineffective Assistance of Counsel. Mr. Shaw asserts that he received ineffective assistance of counsel that rendered his guilty plea involuntary. Mr. Shaw's assertion was addressed and rejected in another personal restraint petition. *In re Pers. Restraint of*

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Shaw, Court of Appeals, No. 27135-8-III, Order Terminating Review, entered March 9, 2009. Because Mr. Shaw's argument was already addressed, this court need not address it again.

Retaliation. Mr. Shaw asserts that his community corrections officer (CCO) retaliated against him by accusing him of violating his probation after he complained to the CCO's superiors about the CCO. The court held a hearing and found that Mr. Shaw had violated his probation by traveling to Idaho without permission. The court modified Mr. Shaw's probation and sent him to jail for 196 days. Mr. Shaw filed this personal restraint petition while he was incarcerated but has since been released. The Department of Corrections asserts that Mr. Shaw's claim is moot now that he is no longer incarcerated because there is no further relief this court can provide.

To obtain relief through a personal restraint petition, the petitioner must show that he or she is restrained and that the restraint is unlawful. RAP 16.4(a). When a court cannot provide the petitioner any effective relief, the case is moot. *In re Rebecca K.*, 101 Wn. App. 309, 313, 2 P.3d 501 (2000).

Here, Mr. Shaw has been released from his alleged unlawful restraint. The relief he requested from the court was to be released from jail. There is no further relief the court can give him. This issue is moot.

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We dismiss Mr. Shaw's personal restraint petition.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Brown, J.